Judging from the affidavit of the plaintiff, I'm satisfied that the plaintiff has stated all facts within his knowledge. As such, to my mind he has made full disclosure.

Applying the principles as laid down in the celebrated House of Lords case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] 2 WLR 316, to the matters as disclosed in the affidavit, it is my view that the interim injunction was rightly granted. As such I see no reason in setting aside the said injunction. Therefore the application is dismissed with costs. However having regard to the circumstances of the case, it would be a proper case for me also to direct an early trial.

KHO YIAN KIM (F) & 2 ORS.

v.

THEN FAH CHIN & ANOR.

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC.
[SUIT NO. KG. 151 OF 1990]
3 DECEMBER 1992

CONTRACT: Sale and purchase agreement - Whether there was such an agreement between the first plaintiff and first defendant - Terms - To what extent as claimed by the plaintiffs - Status of second defendant - Whether any issues raised against her - Remedies - Specific performance specifically claimed - Whether damages appropriate - Costs.

The plaintiffs, in particular, the first two plaintiffs, sought a declaration that the 1st plaintiff was entitled to retain possession of the half of the whole land closer to Serian; alternatively, that she needed only pay the first defendant for that half share the sum of RM20,000 together with whatever interest outstanding as at 31 July 1990; that in any event, the first defendant should execute a registrable transfer in favour of the first plaintiff of that half share.

The plaintiffs claimed that the second plaintiff had lent the first defendant a total sum of RM30,000. The first defendant had built a house on the portion closer to Serian and allowed the first two plaintiffs to live there. It was claimed by the second plaintiff that in 1978 the first defendant agreed to sell the Serian portion to the plaintiffs for RM50,000, with the RM30,000 owed to be deemed as deposit and the balance to be paid within six months. As that portion of the land was currently registered in the name of the second defendant, the plaintiffs wanted the agreement with the first defendant to be specifically performed. A caveat had been entered on the land by the first plaintiff.

The first defendant, on his part, denied the existence of any loan, and whilst admitting to the sale agreement, denied that the subject matter of the sale was the Serian portion, and contended that in any case, the agreement had lapsed due to total lack of consideration as the plaintiff had not paid the agreed price.

The second defendant claimed that she was a *bona fide* purchaser for value under a sale and purchase agreement dated 10 August 1989 entered into with the first defendant. This agreement stipulated that the half portion of the whole land bought by the second defendant was the Serian portion.

Held:

A. Primary issues

[1] There was a sale agreement concluded in 1978 between the first plaintiff and the first defendant for the sale of half of the whole land. It was not, however, conclusively reduced into writing so as to enable either party to invoke ss. 91 and 92 of the Evidence Act 1950.

[2] The first plaintiff had failed to prove that it was the Serian portion of the whole land that was the subject matter of the sale agreement. Even the existing caveat and the accompanying statutory declaration did not make any reference to which portion of the whole land had been caveated.

[3] The selling price was RM50,000 with RM30,000 having been acknowledged received by the first defendant.

[4] None of the parties had abandoned the sale agreement at any material times. Neither was there total failure of consideration, or delay resulting in the sale agreement having lapsed or being rescinded.

[5] The action of the plaintiffs against the second defendant must fail, as they had not proved their case against her. There was no allegation against her in the plaintiffs pleadings in respect of her status in relation to the whole land. The caveat and the accompanying statutory declaration did not specifically refer to the Serian portion. There was nothing for the second defendant to answer from the pleadings. Furthermore, it was not necessary for the Court to consider issues which had not been raised. Moreover, there was not sufficient evidence or material facts presented in support of the plaintiffs' claim.

In any case, the plaintiffs from their pleading had not overcome the effect of ss. 132 and 133 of the Land Code. There was no allegation of fraud and no evidence adduced to that effect.

B. Remedies and costs

[1] The first plaintiff failed in her prayers for a declaration that she was entitled to retain possession of the Serian portion of the land and also in the alternative prayers.

[2] However, damages to be assessed should be awarded to the first plaintiff. There was nothing in her pleading which went to show that specific performance was the only appropriate remedy. And though damages was not prayed for in the claim, the order should be made in the interest of justice.

[3] Costs should be awarded to the first plaintiff as against the first defendant, and to the second defendant as against the plaintiffs. Regarding the second and third plaintiffs, though they did not succeed against the first defendant, as their claim was closely linked to that of the first plaintiff, no costs should be ordered against them in favour of the first defendant.

[Order accordingly]

Cases referred to:

State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(foll)***

Grimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd. [1987] 1 MLJ 302 / [1987] 1 CLJ 123 ***(foll)***

Tan Cheng Hock v. Chan Thean Soo & Anor. [1987] 2 MLJ 479 ***(foll)***

Goh Leng Kwang v. Teng Swee Lin & Ors. [1974] 2 MLJ 5 ***(foll)***

Krishna Murthey & Anor. v. Law Lye Chua [1992] 1 CLJ 684 ***(foll)***

Williams v. Greatrex [1956] 3 All ER 705 ***(refd)***

K.E.P. Mohamad Ali v. K.E.P. Mohamad Ismail [1981] 2 MLJ 10 ***(foll)***

London Chatham and Dover Railway Company v. South Eastern Company [1892] 1 Ch. 120 ***(foll)***

Legislation referred to:

Evidence Act 1950, ss. 91 & 92

Land Code (Sarawak) Cap. 81, ss. 132 & 133

For the plaintiffs - C.J. Eng; M/s. C.J. Eng Advocates

For the defendants - June M.L. Chan; M/s. Satem, Sagah & Chai Advocates

JUDGMENT

Richard Malanjum JC:

This is an action involving mainly two formerly good friends. Due to a dispute over a sale of a portion of a parcel of land, namely, Lot 480, Block 226, Kuching North Land District (hereinafter called "the whole land") two formerly

good friends have come before this Court as two opposing parties with three other persons included. So much for the value of a friendship that had subsisted for over twenty years.

The relief sought:

The plaintiffs, in particular, the first and second plaintiffs have come before this Court to seek the following relief, namely:

(1) a declaration that the first plaintiff is entitled to retain possession of the half of the whole land closer to Serian.

Alternatively, the first plaintiff seeks for an order that:

(a) the first plaintiff needs only pay the first defendant as full and final settlement for the half share of the whole land closer to Serian, the sum of RM20,000 together with whatever interest outstanding under the said Charge with Hock Hua Bank as at 31 July 1990 'that is or was actually outstanding on that charge on the remaining sum of RM20,000 as at 31 July 1990':
(b) in any event, the first plaintiff seeks specific performance of the Agreement between herself and the first defendant as described in paragraph 6 of the Statement of Claim and upon the payment of the sums due under prayer (a) above, the first defendant shall execute a registrable transfer in favour of the first plaintiff of the half share of the whole land closer to Serian:
(c) any other order that the Court deems fit and
(d) costs.

In this judgment my reference to "plaintiffs" will effectively mean the first and second plaintiffs (who are wife and husband) as I did not find from the evidence adduced any involvement of the third plaintiff or the firm Si Lee Company.

The plaintiffs' case:

The gist of the plaintiffs' case is that the second plaintiff had lent money to the first defendant over a period of time whereby between 1977 and 1978 the total sum owing was RM30,000. In 1975 or 1976 the first defendant constructed a house on the portion of the whole land closer to Serian (hereinafter called "the Serian Portion") and allowed the first and second plaintiffs to live there. Then in 1978 the second plaintiff alleged that an agreement was reached with the first defendant to sell to the plaintiffs the Serian Portion. The plaintiffs tendered three documents as exhibits namely Ex. P1, Ex. P2 and Ex. P3 to support their claim. It was contended by the plaintiffs that the selling price for the Serian Portion was agreed at RM50,000 with the RM30,000 owed to be deemed as deposit and the balance to be paid within six months from the signing of (Ex. P3). The plaintiffs claim that they wanted to pay the RM20,000 balance before the expiry of the six months period but the first defendant did not come to collect it. The plaintiffs further say that half of the whole land is now registered in the name of the second defendant and as such the plaintiffs want the Agreement with the first defendant to be specifically performed.

The first defendant's case:

On the other hand the first defendant denied the existence of any loan from the second plaintiff. Further, whilst admitting the existence of a sale agreement of half of the whole land to the first plaintiff the first defendant denied that the subject of the sale was the Serian Portion. The first defendant also contended that the sale agreement had lapsed due to total failure of consideration as the first plaintiff did not pay the agreed price. As for the second defendant her defence is one of *bona fide* purchaser for value.

The primary issues:

Having heard the evidence from both the plaintiffs and the first defendant and their witnesses and having considered the submissions of their respective Counsel I am of the view that in coming to a decision in this action the following issues have to be considered and determined in the light of the evidence adduced and the relevant legal principles. The primary issues are:

(1) whether there was a sale agreement between the first plaintiff and the first defendant:
(2) if so, what were the terms of the sale agreement:
(3) whether there has been full payment of the consideration agreed upon, and if not, whether the sale agreement has lapsed for the non-payment and/or delay; and
(4) the status of the second defendant in relation to the whole land.

Before going into the issues in relation to the evidence adduced I will first deal briefly with some of the basic legal principles which in my view are relevant to this action.

It is settled law that parties are bound by their pleadings. (See: *State Government of Perak v. Muniandy* [1986] 1 MLJ 490). Further, issues brought up in the course of a trial but not in the pleading are not to be considered by the trial Court. (See: *Grimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd.* [1987] 1 MLJ 302).

It is also a legal principle that credibility of a witness is a question of fact to be considered not solely on the demeanour for "that has to be balanced against the rest of the evidence and the probabilities of the case." [See: *Tan Cheng Hock v. Chan Thean Soo & Anor.* [1987] 2 MLJ 479 and *Goh Leng Kwang v. Teng Swee Lin & Ors.* [1974] 2 MLJ 5]. In a case where both parties to an action cannot be believed the liability issue has to be based on onus of proof. [See: *Krishna Murthey & Anor. v. Law Lye Chua* [1992] 1 CLJ 684].

I now deal with the respective primary issues which I consider to be relevant in coming to a decision in this action.

(1) *Whether there was a sale agreement between the first plaintiff and the first defendant.*

From the evidence adduced it is clear that both parties do not dispute that a sale agreement existed between the first plaintiff and the first defendant over a portion of the whole land. The first and second plaintiffs testified that the sale agreement was made in 1978 and that certain documents were signed, namely, an 'agreement' which was adduced at the hearing in the form of only one page in writing (Ex. P1), a Memorandum of Transfer duly signed by the first plaintiff and first defendant (Ex. P2) and a Letter of Acknowledgement/Undertaking (Ex. P2) and (Ex. P3). As for (Ex. P1) the first defendant testified that it was subsequent to (Ex. P2) and (Ex. P3). But he agreed that he wanted to sell a portion of the whole land to the first plaintiff for RM50,000 while the consideration stated in (Ex. P2) was RM40,000. The first defendant attempted to explain that the plaintiffs wanted the figure of RM50,000 in order to evade stamp duty payment. I do not find his explanation logical. PW2, Mr. Mark Chin, a practising advocate since 1973 gave evidence that (Ex. P1) was prepared by his legal firm on the oral instruction of the plaintiffs and the first defendant. PW2's evidence showed that (Ex. P1) was prepared first. It was only when the first defendant did not sign (Ex. P1) that he prepared (Ex. P2) and (Ex. P3) on the instruction of the first defendant. I find no reason to disbelieve PW2 and from the evidence of the first and second plaintiffs and the first defendant respectively it is my finding that on the balance of probabilities (Ex. P1) must have been prepared first. Further, as the first defendant did not challenge the authenticity of (Ex. P1) and based on the evidence of PW2 it is also my finding that (Ex. P1) was prepared on the instruction of the plaintiffs and the first defendant. Thus, having considered the evidence and demeanour of the plaintiffs, PW2, the first defendant and DW1 in the witness box and the exhibits (Ex. P1), (Ex. P2) and (Ex. P3), the irresistible conclusion is that there was a sale agreement concluded in 1978 between the parties. However as to the terms thereof I shall now proceed to consider it.

(2) *What were the terms of the sale agreement*?

In the instant case the terms of the sale agreement can be gathered firstly, from the documents tendered namely, (Ex. P1), (Ex. P2), (Ex. P3), (Ex. P4 and Ex. P4A) and secondly, from the evidence of the parties and their witnesses. It is not in dispute between the parties that the sale agreement was not conclusively reduced into writing so as to enable either party to invoke s. 91 and 92 of the Evidence Act 1950.

On closer examination of the exhibits (Ex. P1), (Ex. P2), (Ex. P3), (Ex. P4) and (Ex. P4A) tendered and after due consideration of the evidence adduced I find that the parties do not dispute the following terms, namely:

(a) that the sale involved a portion of the whole land:
(b) that the sum of RM20,000 being part of the selling price was to be paid within six months from the execution of (Ex. P3):
(c) that the payment of the RM20,000 was to be made through M/s. Mark Chin & Company, the legal firm of PW2.

However, there are disputes on the following items:

(i) which portion of the whole land that was the subject of the sale agreement; and
(ii) what was the final selling price.

On item (i) above it is the evidence of the plaintiffs that it was the Serian Portion that was the subject matter of the sale agreement between them and the first defendant. But the exhibits tendered in particular (Ex. P1), (Ex. P2), (Ex. P3) and (Ex. P4 and Ex. P4A) do not at all state that that was the case. The existing caveat and the accompanying statutory declaration (Ex. P4 and Ex. P4A) do not make any reference as to which portion of the whole land has been caveated. Indeed even PW2, the advocate who prepared all the said exhibits did not say in his evidence that there was any stipulation that the subject matter was the Serian Portion of the whole land. And to go a little further even in the earlier correspondences between the present Counsel of the parties as found in the Agreed Bundle of Documents marked "B" of which the contents themselves were not disputed by the parties and their Counsel, they do not indicate specifically the subject matter of the sale agreement. As for the evidence of the first defendant he testified that it was the portion closer to Kuching that he was selling to the first plaintiff. The second plaintiff also testified that he received a summons in 1989 taken out by the first defendant for an order that the plaintiff's vacate the Serian Portion. But no evidence was adduced before me that steps were taken at that time to show that the subject of the sale between the first plaintiff and the first defendant was the Serian Portion. In the circumstances and having considered the evidence including the demeanour of the parties and their witnesses in the witness box it is my finding that on the balance of probabilities the first plaintiff has failed to prove that it was the Serian Portion of the whole land that was the subject matter of the sale agreement. At most I can only find that the first plaintiff and the first defendant agreed on the sale of half portion of the whole land.

With regard to item (ii) there were also conflicting versions coming from both parties. The plaintiffs testified that the selling price was RM50,000 with the RM30,00 owed to them by the first defendant being deemed to be the deposit payment. As for the balance of RM20,000 the plaintiffs testified that it was represented by (Ex. P3) at that time. PW2 stated that when (Ex. P1) was prepared the first defendant agreed that he had received the RM30,000 when PW2 questioned him. But the first defendant denied in his evidence that he had received the RM30,000 or that he had taken any loan from the second plaintiff. However his denial does not explain why only RM20,000 was stated in (Ex. P3), a document which was prepared by PW2 on his instruction. At best in his attempt to explain, the first defendant only managed to say that he did not know why (Ex. P3) stated RM20,000 when there was another RM30,000 unpaid. I have also noted that the first defendant whilst under cross-examination even went to the extent of saying that he was selling the half portion of the whole land for RM20,000. Having observed him in the witness box and having considered the evidence on this item I am satisfied on the balance of probabilities that the selling price agreed under the sale agreement was RM50,000 with RM30,000 having being acknowledged receipt of by the first defendant. I have no reason to disbelieve PW2 that the first defendant admitted to him that he (the first defendant) had received the sum of RM30,000. Having come to such a conclusion I do not think it is necessary or crucial for me to make any finding as to when and how the first defendant received the RM30,000.

(3) *Whether there has been full payment of the consideration agreed upon and if not whether the sale agreement has lapsed for the non-payment and/or delay*:

Both parties are in agreement that the sum of RM20,000 as stipulated in (Ex. P3) has not been paid. Thus, the crucial point therefore to consider is whether as a result of the non-payment the sale agreement has lapsed.

The plaintiffs testified that before the expiry of the 6 months period from 18 March 1978 (the date of (Ex. P3)), they went to PW2's office with the RM20,000 intending to pay the first defendant through PW2. According to the plaintiffs they requested PW2 to telephone the first defendant to come. But whether or not PW2 called the first defendant the plaintiffs did not know. On the advice of PW2 the plaintiffs stated that they brought home the money. The plaintiffs did not contact the first defendant directly though they knew his whereabouts at that time. Anyway the plaintiffs also testified that in 1981 they went to see PW2 again with the RM20,000 intending to pay the first defendant. Again the first defendant did not turn up though they asked PW2 to call him. As a result PW2 advised them to lodge a caveat on the half portion of the whole land. The advice was taken and the caveat was lodged accordingly.

On the other hand PW2 in his evidence appeared to have no recollection of the first visit of the plaintiffs with the RM20,000. In fact PW2 stated that the money should be paid directly to Hock Hua Bank, being the chargee of the whole land. As for the second visit in 1981 PW2 agreed that he prepared the caveat document and the statutory declaration (Ex. P4 and Ex. P4A) respectively. But he could not recall if the sum of RM20,000 was brought along. Thus, PW2's evidence is not really helpful on this question. But a point to consider is that there was no reason for the caveat to be lodged if the plaintiffs were not prepared to pay the RM20,000 as stipulated in (Ex. P3). The first defendant denied any payment or attempt to pay the RM20,000 by the plaintiffs to him. But even the first defendant admitted that the RM20,000 was to be paid through the office of PW2 and not directly to the bank. Having evaluated the evidence adduced together with the demeanour of the parties and their witnesses whilst in the witness box I am satisfied on the balance of probabilities that the version of the plaintiffs regarding the attempts to pay the RM20,000 is more believable. The refusal of the first defendant to complete (Ex. P1) and his instruction to his son, DW1 (Then Ah Fook) not to execute (Ex. P2) should have been taken by the plaintiffs and PW2 as the early warning signal that the first defendant might want to frustrate the transaction. Be that as it may, there is still the question of whether the sale agreement has lapsed due to the long delay.

Evidence has been adduced through PW2 that in the middle of 1989 the first defendant and the second plaintiff approached him (PW2) to request for the calculation of interest due to Hock Hua Bank (the chargee) of which the whole land was the security. As stated in (Ex. P3) the RM20,000 loan with the bank was payable by the first plaintiff. Further, the second plaintiff also testified that after he received the summons taken out by the first defendant there were negotiations and he was asked to pay a sum over RM90,000 to clear the dispute. On pages 1, 2 and 3 of the Agreed Bundle of Documents "B" the contents of which were not disputed by the parties and their Counsel there is a clear indication that the sum of RM90,802.89 was infact paid over to the Counsel of the first defendant. But due to the disagreement as to which portion of the whole land that was to be transferred the sum paid was refunded. This is indicated in pages 6 and 7 of the Agreed Bundle of document "B" and of which the contents therein were also not disputed by the parties and their Counsel. Upon refusal the motion of this action began. In such circumstances a question to ask is whether the first defendant should be allowed to say that the sale agreement has lapsed or that he has rescinded it as early as 1986 *vide* the letter (Ex. D3). I do not think so. If the first defendant was minded to enforce the time stipulation in the first place he would have done so when he did not receive the payment of RM20,000 from the plaintiffs within six months from 18 March 1978. Further, the first defendant would not have gone along with the negotiations as late as in 1990. In other words and it is my finding on the balance of probabilities based on the evidence adduced that none of the parties have abandoned the sale agreement at any material time. (See: *Williams v. Greatrex* [1956] 3 All ER 705).

On the issue (3) therefore based on my findings of fact there is in my view no total failure of consideration and no delay resulting in the sale agreement having lapsed or being rescinded.

(4) *The status of the second defendant in relation to the whole land*

It is to be noted that throughout the pleading of the plaintiffs there is no allegation against the second defendant in respect of her status in relation to the whole land. Questions were put to DW2 (Chai Jak Min) under cross-examination regarding the existence of the caveat of the first plaintiff. But the caveat (Ex. P4) and the annexed statutory declaration (Ex. P4A) do not specifically refer to the Serian Portion. It is also to be noted that there was no clear challenge on the validity of the Sale and Purchase agreement dated 10 August 1989 (Ex. D1) entered into between the first and second defendants. (Ex. D1) was the basis for the transfer of half of the whole land to the second defendant *vide* the Memorandum of Transfer dated 13 February 1990 (Ex. D2). And (Ex. D1) stipulated that the half portion of the whole land bought by the second defendant is the Serian Portion. In my view therefore there is nothing for the second defendant to answer from the pleading of the plaintiffs. Further, I do not think it is necessary for me to consider issues which were not pleaded. (See: *Grimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Sdn. Bhd. (Supra)*). Moreover, I do not find sufficient evidence or material facts

presented in support of the claim of the plaintiffs against the second defendant. (See: *K.E.P. Mohamad Ali v. K.E.P. Mohamad Ismail [1981] 2 MLJ 101*). I hold therefore that on this issue the plaintiffs have not made out any case against the second defendant.

In the event that I am wrong in my preceding view I do not think the plaintiffs from their pleading have overcome the effect of s. 132 and s. 133 of the Land Code. There is no allegation of fraud and no evidence adduced to that effect. As such I do not think the plaintiffs have proved their case against the second defendant.

In my judgment therefore the action of the plaintiffs as against the second defendant fails.

Conclusion:

In view of my finding as to which portion of the whole land was the subject of the sale agreement I hold that the first plaintiff fails in her claim for prayer (1) as stated in her statement of claim and I refuse to grant it.

As for the alternative prayers of the first plaintiff, namely, prayers (4) and (5), for the same reason in refusing prayer (1), they are also refused.

However, on the basis of my findings on the primary issues (1), (2) and (3) as discussed above, this Court should make an order as it deems fit in the circumstances. I am aware that from the statement of claim the Serian Portion was specifically claimed. But the first plaintiff should not be denied justice.

In the case of *K.E.P. Mohamad Ali v. K.E.P. Mohamad Ismail (Supra)* the material facts relating to the acknowledgment of debt were not pleaded in the statement of claim. The defence raised the issue of limitation but in the reply there was also no reference to the acknowledgment. The then Federal Court however allowed the issue of acknowledgment thereby overriding the defence of limitation. His Lordship Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said at page 12:

> Since the material facts and circumstances were not pleaded in the Statement of Claim, it should have been pleaded in the reply. Be that as it may, this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which a decision to that effect could be arrived at. As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In the instant case it is not in dispute that the caveat lodged by the first plaintiff is still subsisting on half portion of the whole land. I have pondered whether I should order that the remaining half portion of the whole land should be transferred to the first plaintiff. As there is still a repayment to be made to Hock Hua Bank, the chargee, and there is no assurance that the sum payable by the first plaintiff will be sufficient to discharge the charge, it will be favourable to the first plaintiff if another form of remedy can be awarded to her. There is nothing in the pleading of the first plaintiff which goes to show that specific performance is the only appropriate remedy. Accordingly, in my judgment justice requires that damages to be assessed should be awarded to the first plaintiff. Though damages was not prayed for in the claim I am of the view that this Court should make the order in the interest of justice. In the case of *London Chatham and Dover Railway Company v. South Eastern Company* [1892] 1 Ch. 120, Kay L.J. expressed his view thus at page 152:

> There are considerable technical difficulties in the way of giving this relief, not the least of which is the fact that the plaintiffs have considered the action rather as one for specific performance of the contract than an action for damages for breach, and the pleadings certainly do not ask for damages. But I need not consider these difficulties. If the case were one in which justice required that such damages should be given, the Court would not be prevented, under our present system, by any technical difficulty from doing justice.

I also order costs to the first plaintiff as against the first defendant and costs to the second defendant as against the plaintiffs. Effectively, the second and third plaintiffs did not succeed in their claim against the first defendant but owing to the nature of their claim which is closely linked to the claim of the first plaintiff, I do not think any costs should be awarded against them in favour of the first defendant and I make no order.